IN THE

COURT OF APPEAL.

PROVINCE OF ONTARIO.

Appeal from the County Court of the County of Huron.

BETWEEN

ROBERT TAGGART,

(Plaintiff,) Appellant.

AND

WILLIAM JAMES TAGGART,

(Defendant,) Respondent.

J. T. GARROW,
Attorney for Appellant.

CAMERON, HOLT & CAMERON,
Attorneys for Respondent.

GODERICH, ONT.
HURON SIGNAL PRINTING HOUSE, NORTH STREET.
1880.

IN THE COURT OF APPEAL.

In appeal from the County Court of the County of Huron.

ROBERT TAGGART,

Plaintiff, Appellant.

vs.

WILLIAM JAMES TAGGART,

Defendant, Respondent.

Action commenced by writ (specially endorsed) dated 3rd October, 1879.

Declaration: filed 31 October, 1879, For that the Defendant is indebted to the
1 Plaintiff for money payable by the Defendant to the Plaintiff for money awarded by James Mullen, Robert Murray, and Charles Girvin, to be paid to the Plaintiff by the Defendant, by an award of the said James Mullin, Robert Murray, and Charles Girvin, made under a submission to their arbitration by the Plaintiff and Defendant, of matters in difference between them; and the Plaintiff claims two hundred dollars.

Pleas: Filed 10th November, 1879.

1. Nunquam indebitatus.

2. Satisfaction and discharge by payment before action.

3. That before the commencement of this suit, the Plaintiff was and still is indebted to the Defendant in an amount greater than the Plaintiff's claim, for that certain disputes and
2 differences having arisen between the Plaintiff and Defendant, the Plaintiff and the Defendant by their several Bonds, dated the Twenty-eighth day of August, in the year of our Lord one thousand eight hundred and seventy-nine, became each bound to the other in the penal sum of one thousand dollars, which said several bonds after reciting that disputes and differences had arisen and were then pending between the Plaintiff and Defendant, touching and concerning certain unsettled accounts between them, and also touching and concerning their respective rights under a certain lease (with a right to purchase) of certain lands mentioned and described in said lease, and of certain goods and chattels, which said lease was dated the

Thirtieth day of July, A. D. 1877, and was made between the Plaintiff, of the first part, and the Defendant and one Clark Taggart, of the second part, and also after reciting that the Plain-
3 tiff and Defendant had agreed to refer such disputes and differences, as well as all actions, suits and controversies, accounts, reckonings, matters and things, and also their respective rights under the said lease to the award, arbitrament, final end and determination of James Mullin, of the Township of Ashfield, in the County of Huron, contractor, and Robert Murray, of the village of St. Helens, in the County of Huron, Township Clerk, and such third arbitrator as the said two arbitrators by writing under their hand endorsed on the said bonds, should before proceeding with the said reference appoint; and had further agreed that the decision of the said arbitrators or of any two of them, should be final and conclusive, and also after reciting that the Plaintiff and Defendant had also agreed that the said abritrators should have full power by their award to cancel the said lease
4 so far as the same affected the Defendant and the Plaintiff, and also to cancel the right to purchase therein contained, and to award such damages by reason of such cancellation as they the said arbitrators might deem fit and proper, and also to give up possession of the lands mentioned in said lease, and also as to the execution of mutual releases and generally to dispose of all matters relating to such lease, were subject to a condition, that if the Plaintiff and Defendant should well and truly submit to abide by and perform the award, arbitrament and determination of the said arbitrators so nominated, appointed and chosen as aforesaid, touching and concerning the matters in dispute between the above bounden Plaintiff and Defendant, and so referred to them, the said arbitrators as aforesaid; Provided such award be made in writing under the hands and seals of the said arbitrators or any two of them, ready to be de-
5 livered to the said parties, or such of them as should apply for the same on or before the first day of November, A. D. 1879, with power to the said arbitrators or any two of them to enlarge the time for making said award, then the said obligation was to be void, otherwise to remain in full force and virtue. And by the said bonds it was further agreed by the Plaintiff and Defendant that the costs and charges of preparing the said bonds and all costs and charges attending the said arbitration and award should be in the discretion of the said arbitrators; and the Defendant avers that the said arbitrators, James Mullin and Robert Murray by writing under their hands endorsed on the said bonds before proceeding with the said reference did appoint Charles Girvin such third arbitrator. And the Defendant further avers that the said three arbitrators, James Mullin, Robert Murray and Charles Girvin, before the
6 said first day of November, in the year of our Lord one thousand eight hundred and seventy-nine, took upon themselves the burden of the said arbitration, and having heard and considered the several allegations, statements and evidence of the Plaintiff and Defendant, did before the time limited by said submission, to wit: on the third day of September, A. D. 1879, make their award in writing under their hands and seals of and concerning the matters so referred to them as aforesaid, ready to be delivered to the said parties on or before the said first day of November, A. D. 1879, to wit: on the third day of September, A. D. 1879, which said award is in the words and figures following, that is to say:

To all to whom these presents shall come or whom they may concern.

James Mullin, of the Township of Ashfield, in the County of Huron, contractor, and

7 Robert Murray, in the Village of St. Helens, in the County of Huron, Township clerk, to whom were submitted (with the direction to appoint a third arbitrator) the matters in controversy existing between William J. Taggart, of the Township of Wawanosh, in the County of Huron, yeoman, and Robert Taggart, of the said Township of Wawanosh, yeoman, as by the condition of their respective bonds of submission executed by the said parties respectively each to the other, and bearing date the twenty-eighth day of August, one thousand eight hundred and seventy-nine, more fully appears.

And whereas in pursuance of the said direction contained in said bonds of submission, we the said James Mullin and Robert Murray, did before proceeding with such reference nominate and appoint Charles Girvin, of the said Township of Wawanosh, Esquire, such third
8 arbitrato..

Now therefore know ye that we the said James Mullin and Robert Murray the arbitrators mentioned in the said bonds and Charles Girvin the arbitrator appointed in pursuance of the power and direction contained in such bonds having heard the proofs and allegations of the parties and examined the matters of controversy by them to us submitted do make our award in writing.

First. We award, order, and determine that the said Robert Taggart is now justly and truly indebted to the said William J. Taggart in the sum of seventy six dollars as the balance due on the unsettled accounts between them mentioned in the said bonds and also that there is due to the said Robert Taggart on the first day of October A. D. 1879 from the said William
9 J. Taggart the sum of two hundred dollars for rent under the Lease mentioned in the said bonds and we award, order, and direct that the said sum of seventy six dollars be deducted from the said sum of two hundred dollars and that the said William J. Taggart on or before the second day of October A. D, 1879, pay to the said Robert Taggart the balance of one hundred and twenty four dollars, which sum is to be in full of said rent under such Lease, and of said unsettled accounts secured. We do award, order, and direct the said lease, mentioned in said bonds of reference and the right of purchase, therein mentioned in so far as the said William J. Taggart is concerned are hereby rescinded and cancelled and also that the said William J. Taggart in so far as he is concerned do on or before the first day of December A. D. 1879 surrender and deliver up to the said Robert Taggart, the said term, the said lease, the
10 lands and premises therein metioned, and all right and title thereto or thereon and also that the goods and chattles mentioned in said lease to wit, a pair of mules which were substituted for the one span of horses in the Lease mentioned and all farming implements covered by said Lease be and the same are hereby surrendered and delivered up by the said William J. Taggart to the said Robert Taggart, subject, however to the following conditions.

1st. That the said Robert Taggart give the said William J. Taggart the use of the said mules, harness and waggon for ten days next, from the Nineteenth day of September A. D. 1879.

2nd. The said William J. Taggart to have the right to enter on the said land at any time up to the first day of March A. D 1880, for the purpose of removing any property of his from
11 off said premises.

3rd. The said Robert Taggart to have the right to enter on said land mentioned in said lease at once in order to do fall ploughing and sow fall wheat doing no damage whatever to the said William J. Taggart or his property.

Third. We award, order and direct that the said Robert Taggart do and shall pay to the said William J. Taggart the sum of two hundred dollars on or before the first day of October A. D. 1880, as and for the damage accruing to the said William J. Taggart by reason of the cancellation of said Lease and of the surrender by him of the right to purchase therein contained. And that the said Robert Taggart do on or before the first of October, A. D. 1879. give the said William J. Taggart security for the due payment of such sum at the time aforesaid to wit
12 the first day of October, A. D. 1880. And in case the said Robert Taggart fail in giving such security at the time mentioned, then we do award, order and direct that the said Robert Taggart do pay the said sum of two hundred dollars to the said William J. Taggart, on the first day of October A. D. 1879. We award, order and direct that the said William J. Taggart do pay the costs of said reference and award forthwith which we fix at the sum of fifty eight dollars.

In witness whereof we have hereunto subscribed our names this third day of September in the year of our Lord one thousand eight hundred and seventy nine.

Signed, Sealed and delivered in the presence of Philip. Holt.	S'd James Mullin,	(Seal)
	S'd Robert Murray,	(Seal)
	S'd Charles Girvin,	(Seal)

13 And the Defendant further avers that the Plaintiff and Defendant attended on said Arbitration before said Arbitrators during the progress of said Arbitration, without any objection as to the regularity of the proceedings under said bonds, and the defendant further avers that the said Arbitrators on the said third day of September, A. D. 1879, duly published the said award to the Plaintiff and Defendant who then had notice thereof and of the contents thereof.

And the defendant further avers that the said Plaintiff did not on or before the said first day of October in the year of our Lord one thousand eight hundred and seventy nine, give to the Defendant security for the due payment to the Defendant by him, the Plaintiff, of the said sum of two hundred dollars, so by the said award awarded and directed to be paid by the Plaintiff to the defendant on the first day of October A. D. 1880, as required and directed by
14 said award although duly requested by the Plaintiff so to do but on the contrary thereof the said Plaintiff neglected, refused and failed to give to the defendant such security on or before the said first day of October A. D. 1879, for the due payment by the Plaintiff to the Defendant of the said sum of two hundred dollars at the time mentioned in said award, to wit, the first day of October A. D. 1880. Nor did the said Plaintiff pay to the Defendant the said sum of two hundred dollars on the said first day of October in the year of our Lord one thousand eight

hundred and seventy nine, ar any part thereof but wholly neglected and refused so to do, and for money payable by the Plaintiff to the defendant for money awarded by James Mullin, Robert Murray and Charles Girvin to be paid to the Defendant by the Plaintiff by an award of the said James Mullin, Robert Murray and Charles Girvin made under a submission to their
15 arbitration by the Plaintiff and Defendant of matters in difference between them.

And the defendant claims to recover a balance.

Replication filed 18th November, A. D. 1879.

1. Joinder of issue on the Pleas of the Defendant.

2. Second Replication to the Defendant's third plea: That the Plaintiff did on or before the first day of October, in the year of our Lord one thousand eight hundred and seventy-nine, give to the Defendant security for the due payment to the Defendant, by him, the Plaintiff, of the said sum of two hundred dollars, so by the said award awarded and directed to be paid by the Plaintiff to the Defendant on the first day of October, in the year of our Lord one thousand eight hundred and eighty.

16 3. Third Replication to Defendant's said third plea: That the Plaintiff always was ready and willing to give to the Defendant security for the due payment of the said sum of two hundred dollars, and on the first day of October, in the year of our Lord one thousand eight hundred and seventy-nine, he tendered to the Defendant a promissory note for the said sum of two hundred dollars, payable to the Defendant on the said first day of October, in the year of our Lord one thousand eight hundred and eighty, made by the Plaintiff, William J. Bennett, and Alexander Phillips, which the Plaintiff avers was a reasonable and sufficient security for the due payment by the Plaintiff to the Defendant of the said sum of two hundred dollars. Yet the Defendant without any just or sufficient cause refused to accept or receive the said security.

17 Rejoinder filed 18th November, A. D. 1879.

Defendant takes issue upon the Replication of the Plaintiff.

Case tried before a jury on the 11th December, 1879, W. R. Squier, Esquire, Judge.

EVIDENCE TAKEN AT TRIAL.

Counsel for Plaintiff, Mr. Garrow.

Counsel for Defendant, Mr. Cameron.

James Mullin, sworn:

I know the parties to this suit. I was an arbitrator between them. I was a witness t›

exhibit "A." An award was made by the arbitrators, of whom I was one (the award is now put in marked "B"), and the endorsement marked C is in my hand writing.

18 Cross-Ex'd—Mr. Girvin was not present when the evidence was taken. I don't think he was. Mr. Girvin was not there when the evidence was taken. After the evidence was taken and the two arbitrators had failed to agree Girvin came in.

Robert Taggart, Plaintiff, sworn:

I am the Plaintiff—the lease has been cancelled, as the award directs. No move has been made towards the setting aside of the award. On the 1st October, I tendered a note to the Defendant, and I believe W. J. Bennett now has the note. The note now produced marked "D" is the one I tendered to the Defendant. When I tendered the note Defendant said, neither of securities was good and neither of them w[illegible]. I am worth $1000; Phillips $1000 and Bennett $500. I think I offered good security when I offered the note on 1st Octo-
19 ber. He refused to take it, and said he'd be damned if he'd take it. Alexander Phillips was present. We were not on friendly terms. If I did not offer the securities then, I did not do so at all.

Cross-Ex'd—I think it was on Wednesday that I tendered it to the Defendant I tendered the note on the first October. The Defendant's house and mine are near together. When I tendered the note Defendant was going out to meet a team—Fitzpatrick was driving it. If Ed, had been there and the horses quiet he could have heard what went on. When I tendered the note I was nearer than 15 feet to the Defendant. The note marked D is the only one tendered on that day. I told Defendant this was a non-negotiable note and Defendant said he wanted a note he could sell, with good security. I told him I knew he would sell the
20 note and his property was in his pocket. He would not take the note. My farm is mortgaged for $1300. My chattels were mortgaged, but the mortgage is discharged. I have a mortgage upon Bennett's mares. Defendant said he would take such security as he could sell. I tried Irwin and White and they refused to endorse. I did not see Defendant at Lucknow. But I don't remember whether I saw him on my way home. That evening I heard but did not see him. On the 3rd Octoner, I tendered him the negotiable note, *i. e*, I would give the note if he would pay the rent. On the 1st I told him I would give him a negotiable note if he would come into town the morrow and pay me the rent; he said he was not bound to run over the country after me

W. J. Bennett, sworn:

21 I know the parties, I drew the note marked "D" about 11 on the first October. Plaintiff asked me to draw the note. At the time the note was drawn Alexander Philips was there. I saw the parties on the same day when he (P) offered the note and told him W. J. Bennett and A. Philips were on the note and he said he would not take it, to stick it in his a——. I saw the note in his hand. The Defendant said he had the money in his pocket, and he would like to see the man who would take it out. Philips was inside at the time of the conver-

sation, nobody was present so far as I could see. But Ed. Fitzpatrick was coming down the road. He came on to where the parties were talking. I am worth more than the face of my note. Philips is worth considerable, he is a sufficient security for $200.00. On the 4th October I saw Defendant and served a writ on him for $124.00. He said he would not take the
22 note because it was not security.

Cross Ex'd It was at Dungannon that I heard Plaintiff say he would not take the security. When I was there the old man said "Here William is this note." He told him that Alex Philips and W J. Bennett were to it as securities. At that time he was not very far from the Defendant. Defendant said he might stick it in his a---- He said he was damned if he would take it. I recollect of nothing more being said than I have stated. I saw the note when Plaintiff was talking to the Defendant. Defendant said Plaintfff told him it was a non-negotiable note, and said he wanted a note he could sell, and the old man said as soon as he would pay the rent he would give a negotiable note.

Alex. Phillips, sworn:

23 I am a son-in-law of Plaintiff's. I signed the note marked D on the 1st October. I don't know about the note after it was signed, I did not see the note that day again. I saw it after. I am worth over $1000. I afterwards denied I had signed a note of the kind. I am on good terms with both parties.

Cross-Ex'd—I told Defendant I had not signed a note that day in the presence of Young Fitzpatrick. I did sign the note in the morning. I told Defendant before the 1st October that if I got a good chance to sell I would go away.

John Mallough, sworn:

I live in Wawanosh. I know Plaintiff, Bennett and Phillips I lend money and buy notes. Phillips is good for $200. I was asked by Defendant if I would take the note and I
24 said I would.

E Campion, sworn:

I am Attorney for Plaintiff. I am also Attorney for the Defendant in an action brought by the present Defendant against the present Plaintiff upon the award in question in this suit.

CASE.

Mr. Cameron says that the award is under seal, and that the declaration is in assumpsit.

2. No evidence of any reference between parties.

3. The Plaintiff tendered a non negotiable note and that is not a legal tender.

4. There was no tender at all because it was not made under such circumstances as would give the Defendant an opportunity of examining the note.

25 5. The note is no note.

6. There is no note as note is not stamped.

DEFENCE.

W. J. Taggart, sworn:

I am the Defendant. I saw no note or any document on 1st October. I saw the Plaintiff on the 1st October between 11 and 12 o'clock. He was not closer than two rods, when he came to me then. He said, "this is the day that note is to be settled and I'll give a note for $76 if you will allow me 10 per cent on the $124 you have to give me now," I said "No." I had paid $58 for the arbitration fees, and I would not pay any more There was no note tendered to me then. I went to Lucknow on the same day and returning I saw the old man
26 and asked him, if he had that note and he said "No, but you go into town to-morrow and I will give you one. I would not take Bennett, but I would take Phillips.

Cross-Ex'd— Had I been tendered a note signed by father and Phillips I would have taken it. There never was a note offered me but on the 3rd. I never said I would not take the note because it was not negotiable. On the 18th October I said at Dungannon I would not take the note because the names were not good security. On the 3rd Plaintiff claimed he offered a note. If a paper of the kind produced had been tendered to me I would have accepted it I did say that I would not take the security because the award called for good security. I found I was mistaken as to the award.

Re-Ex'd—On the morning of the 1st I had a conversation with the old man.

27 Edward Fitzpatrick, sworn:

I live in Wawanosh, and remember the 1st October, and on that day was with Defendant and took oats for him to Lucknow. When I first saw the old man I was going to Ryan's. I heard the old man say something about ten per cent on a note and that he would give Aleck Phillips as a backer. William said there was no use of settling that way as he might as well have paid the $58 in the first place. After that I went to Ryan's and from that to Lucknow, and returning we had to pass Plaintiff's place. When we passed Defendant called the old man out and asked him if he had that note, the old man said he would meet him in town to-morrow. At that time there was no note produced.

Cross-Ex'd—I have nothing against the old man. I am bad friends with him. When we

28 passed Defendant's house the old man came as far as his own door. I did not hear the son say he would take a negotiable note. I don't remember all that was said. All I did was to ask the Defendant how the case was going.

Henry Ryan, sworn :

I live in Wawanosh and know Plaintiff and Defendant, and I saw Defendant before he went to Lucknow, and Plaintiff there too. They were about 30 feet apart, I heard Plaintiff saying something about a note and 10 per cent on a note, and Defendant said he had paid for settling, and that's the way he would settle. I did not hear the Plaintiff offering a note that day. Nor did I see one. In the evening when they came from Lucknow I saw them I heard William hallooing and asking have you got that note, and he said he had not it, but if
29 he would follow him into town to-morrow he would give it to him.

George Canwell, sworn :

I was with Defendant coming home from Lucknow on 1st October. We were all sober. I stopped apposite the old man's place. I heard William ask about a $200 note, and the old man said if he would come into town to-morrow he would give it to him.

Cross-Ex'd—When the Defendant drove up he asked the Plaintiff whether he had that $200 note, and he said he had not but if he went into Goderich he would get the note.

DEFENCE CLOSED.

James Mullin, recalled by Plaintiff:

I was at Dungannon on Division Court day, and saw the Taggarts there, and I wanted
30 the parties to settle. I asked him why he did did not take the note, and he said he would have taken the note, but it was drawn to bearer, or something of that kind, and he did not think the security was good.

I enter verdict of non-suit, and by consent of parties, Plaintiff to be at liberty to move to enter verdict for Plaintiff for $124, and Defendant to be at liberty at the same time to move to enter a verdict for him for $76.

RULE NISI

January Term, 43 Victoria.

Monday, January 5th, 1880.

Let the Defendant, his Attorney or Agent upon notice of this Rule show cause:

31 Why the non-suit entered herein should not be set aside, and a verdict entered for the Plaintiff pursuant to leave reserved at the trial, on the ground that the non-suit entered by the learned judge was contrary to law, evidence and the weight of evidence. Or why the said non-suit should not be set aside and a new trial granted on the ground that the non-suit entered is contrary to law and evidence, and meantime let all proceedings be stayed.

On motion of Mr. Garrow,
of Counsel for Plaintiff.

By the Court,

D. McDONALD,
Clerk.

JUDGMENT ON RULE NISI.

32 The Plaintiff brings his action in debt for the enforcement of his claims under the award produced in evidence and has thus assumed the burden of proving not only a valid award but a mutual submission of the matters thereby determined. Though according to the recitals contained in the award a written submission would appear to be in existence the Plaintiff instead of producing and proving the same in the ordinary way relied upon the acts and conduct of the Defendant as precluding him from objecting to the want of the necessary submission. In Stuart vs Nicholson 3 B. N. C. 113 the signature by the Defendant pursuant to the directions of an award of an undertaking not to pirate the Plaintiffs inventions was held sufficient proof of Defendants having submitted to the arbitration The same principle is acted upon in Tyre-
33 man vs Smith 6 E & B 719 where the parties by acting upon the reference as still subsisting were held to be estopped from denying the existence of circumstances necessary to give Jurisdiction to the Arbitrators who had entered upon the reference after the expiring of the time limited by the order. It appears by Mr. Campion's evidence that the present Defendant has brought an action against the present Plaintiff upon this award and that the Defendant has demanded the security to which he considered himself entitled thereunder. These circumstances seem to me to be quite sufficient to estopp the Defendant from denying the existence of a submission upon which to base the award.

The Defendant by the terms of the award was entitled on the 1st October 1879 to a valid

and reasonably sufficient security for the payment by Plaintiff to him of the sum of two hun-
34 dred dollars. The Defendant now contends that no proper offer or tender of any security was made to him by the Plaintiff on that day and further that the document produced for his acceptance purporting to be a promissory note was not a promissory note and so was no security to him for the payment of the said sum. In ordinary cases a tender must be made in such a manner and under such circumstances as will afford the person to whom the tender is made an opportunity of determining whether he will accept or refuse the thing tendered, of whatever nature it may be. In Isterwood vs Whitmore et al 11 M. & W. 347 it was held that an offier to deliver goods in closed casks was not a good tender because there was no opportunity for inspection and in Matheson vs Kelly 24 U. C. C. P. 598 where a tenant wishing to pay rent to his Landlord placed his right hand in a desk and without producing the money said "Here is your
35 rent" it was held that there was no evidence of a tender. In his evidence at the trial the Plaintiff says that he was nearer than 15 feet when he offered the note; the Defendant that he was two rods away, and Ryan that there was a distance of 30 feet between Plaintiff and Defendant. There is some doubt as to whether the Plaintiff actually produced the instrument but it is clear that he had one with him and that the Defendant was aware of this but so far as I can gather from the evidence which is conflicting on that point, no formal offer of the document was made to the Defendant and even if there were it was at such a distance that the Defendant had no opportunity for determining whether he should refuse the security upon grounds other than those mentioned by the Plaintiff. I am unable to discover any reason why the rule which operates in the case of a tender of money or goods should not be applied to a
36 case of this kind. Here the award requires the delivery of security to the Defendant for the payment of a certain sum of money and the Plaintiff endeavors to consummate that delivery by telling the defendant at a distance of from 15 feet to 2 rods that he had a note of a certain nature but he did not at any time as it seems to me he should have done, place the document in Defendants hands or give him such an easy opportunity of inspecting it that the Defendant would thereafter be unable to plead ignorance of its character or contents. The Defendant might have dispensed with the formality of a tender by his previous announcement that he would not receive such a security as Plaintiff offered or intended to offer (see Matheson vs Kelly supra and the cases there cited) but such dispensation could only operate to relieve the Plaintiff from the formality of a tender and not from the necessity of endeavoring to make or of being in a position
37 to make a tender of some security. The objection of the Plaintiff in Polglase vs Oliver 2 C. & J. 14 was not that the amount tendered was in Country Bank Notes instead of gold, but that the sum tendered was insufficient and it was held that he was thereby precluded from saying there was not a valid tender. If the notes tendered had been counterfeit or had they been so many pieces of blank paper it would not have been held I think that an effectual tender had been made. In the present case had a properly drawn and properly stamped note been tendered and had the Defendant objected only to its non negotiability he would be taken to have waived any objection to the number of the sureties or the sufficiency of the security. The waiver here however upon which the Defendant insists is a waiver of all his rights under the award The Defendant might certainly in
38 express terms forego any security to which he might be entitled but by objecting to some of the incidents of the note he cannot be estopped from insisting as he does that the document

tendered is in its fullest sense worthless. There was undoubtedly as appears by the evidence of the Defendant, Ryan and Fitzpatrick, a demand made by the Defendant subsequently on the same day for the security and a refusal by the Plaintiff to comply with his request, though the Plaintiff denies this stating in reply to Defendants question as to whether he had the security—"yes, the same old thing," but it is not necessary in view of my opinion as to the proceedings in the morning to consider the effect of this demand and refusal.

Assuming, however, that a valid tender was made, I am to determine whether the document offered was one which the Defendant was bound to accept as reasonably sufficient
39 security within the terms of the award. It is not disputed that the Instrument produced in evidence is the paper which the Plaintiff had with him at the time of the abortive tender on the morning of October 1st, and that the stamps, two 3c. postage stamps, and no other were affixed to it at that time and so the Defendant contends that the document, being unstamped, was invalid as a bill or note under the Acts relating to stamps upon bills and notes and was not therefore at the moment of tender a security to him for the payment of the amount mentioned on its face (McKay vs. Grimley, 30 U. C., R, 54; Scott vs The Queen, 2 Sup. ct., Rep. 349.) The reception of the document on evidence, though unstamped, simply to prove its existence as such and the tender of it was quite proper (Ponsford vs. Walton, L. R. 3, C. P. 167) and I think that by omitting to object to the character of the Instrument until the close of the case
40 the Defendant did not deprive himself of the right of insisting upon its invalidity and its insufficiency as a proper and reasonable security. I have no difficulty, therefore, in holding as I do, that the document said to have been tendered was invalid as a promissory note, by reason of the want of stamps and so was absolutely valueless as a security to the Defendant. It is true that the Defendant might have taken the note and by double stamping have rendered that effectual as a security which the law declares to be invalid; and perhaps, if he had so taken it, he could not now be heard to object to the want of stamps (Watts vs. Robinson, 32 U. C, R. 362) but the Plaintiff being bound to give the Defendant "security" cannot impose upon the Defendant the trouble and expense of converting the tendered doument into a valid promissory note, a "security" within the terms of the award. The rule should be discharged with costs.

41 Rule discharged with costs.

RULE DISCHARGING RULE NISI.

As yet of January term 1880.

43 Victoria.

Upon reading the Rule Nisi herein dated the fifth day of January A. D. 1880 and upon hearing counsel for both parties, it is ordered that said Rule Nisi be and the same is hereby discharged with costs.

Dated January 24th A. D. 1880.

REASONS OF APPEAL.

The Plaintiff submits that the said Rule Nisi should have been made absolute for a new
42 trial on the grounds stated in the said Rule for the following, among other reasons :

1. The Plaintiff's case was proved by proof of the award which the learned Judge of the County Court held to be sufficiently proven. The real controversy arose upon the evidence upon Defendant's right of sett off, this set off depending upon the question of whether the Plaintiff had complied with the award, by tendering to the Defendant a security on the first day of October The learned Judge held that there was no evidence of any tender of security, and that in any event the instrument said to have been tendered, was not a security within the contemplation of the award because unstamped. Upon these findings the case should under any circumstances have gone to the jury, and a non-suit was improper.

2. There was some evidence of a tender of the instrument in question on the first of
43 October, in compliance with the award, and if such evidence was conflicting, that was for the jury, not for the Judge.

3. There was some evidence that the Defendant by his conduct waived the right to demand a strict tender of such security, which was also a question of fact for the jury.

4. It appeared by the evidence that the demand made in the evening by the Defendant was neither made in a reasonable manner nor at a reasonable time and place, and moreover the alleged refusal by the Plaintiff to then give the security was distinctly denied. There was, therefore, upon this point if material a conflict of evidence, and, therefore, a question of fact for the jury.

5. The objection to the instrument tendered urged by the Defendant at the trial, and
44 upon which the learned Judge held in his favor was that it was not properly stamped. This objection is untenable for the following reasons:

(*a*) It was not taken when the instrument was tendered on the first of October, but the Defendant then objected only to the sureties after hearing their names, and to the manner in which it was drawn. He thereby waived all other objections.

(*b*) The Plaintiff was not bound to stamp the instrument tendered until the Defendant had expressed his willingness to accept it. Had the Defendant offered to accept the instrument, the Plaintiff could lawfully until the actual delivery to the Defendant have stamped it.

(*c*) The instrument was proved, read and put in by the Plaintiff at the trial as a
45 promissory note without any objection being raised to the want of stamps by the Defendant, who first intimated this objection when at the close of the Plaintiff's case he

moved for a non suit; upon that and other grounds, the objection should have been taken when the instrument was tendered in evidence, and before it was put in or read.

Baxter vs. Baines 16 *C. P. at page* 246.

Field vs. Wood 7 *A. and E.* 114.

Foss vs. Wagner note (*a*) *in last mentioned case.*

Doe D. Phillips vs. Benjamin 9 *A. and E.* 644.

(*d*) As the instrument was capable even by the Defendant of being made a valid promissory note by stamping it, and as such stamping would have related back to the
46 original making thereof and rendered it valid as of the time of such making (Imperial Bank vs. Boulton 4 Appeal Reports 228.) The instrument even if unstamped ought not to have been held to be no security, (Watts vs. Robinson 32 U. C. R. 362,) and no evidence of any security within the meaning of the award. If it was some security its sufficiency was a question for the jury.

(*e*) The objection as to stamps should have been pleaded.

Rule 8 *Trinity Term* 1856.

Baxter vs. Baines 15 *C. P.* 237.

Imperial Bank vs. Boulton 4 *App.* 228.

6. Upon the question of tender the following cases will be referred to:

47 *Saunders vs. Graham Gow*, 111.

Eckstein vs. Reynolds 7 *A. and E.* 80.

Marsden vs. Good 2 C. *and R.* 133

Jackson vs Jacobs 3 *Bng. N. C.* 869.

Long vs. Long 17 *Grant* 251.

Tarleton vs Jones 9 *M. and W.* 675.

Polglass vs. Oliver 2 *C. and J.* 15.

Jones vs. Arthur 8 *Dowling* 442.

Henwood vs. Oliver 1 *Q. B.* 409.

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INDEX.

1. Pleadings ..... 2.
2. Evidence at Trial ..... 6.
3. Rule Nisi ..... 11.
4. Judgment ..... 11.
5. Rule Discharging Rule Nisi ..... 13.
6. Reasons of Appeal ..... 14.